Ho Kam Phaw v Fan Sin Nin

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-1 OF 1998 (W)

EUSOFF CHIN CHIEF JUSTICE, WAN ADNAN CJ (MALAYA) AND ZAKARIA YATIM FCJ

23 AUGUST 1999

***Contract** — Formation — Terms — Agreement to dissolve partnership — Agreement drafted by respondent's solicitors — Second draft rejected — Third draft agreement same as first draft that was previously agreed to — Whether there was binding contract between the parties when appellant executed the third draft agreement*

The appellant and the respondent were partners of a firm of solicitors. As there were differences between them, they decided to dissolve the partnership and entered into negotiations to settle their differences through a deed of settlement drafted by Messrs Kiru & Yong at the respondent's instruction. Some minor amendments were proposed to the first draft of the agreement and the second draft was sent to the respondent, duly executed by the appellant. The respondent's solicitors rejected the second draft agreement on the grounds that it contained changes that were not agreed to. The respondent also stated that any changes proposed by the appellant should be referred to and discussed with Mr Max Yong of Messrs Kiru & Yong. On 8 July 1996, a copy of the deed of settlement was faxed to the appellants by Messrs Kiru & Yong ('the faxed draft'). The appellants executed the faxed draft on 9 July 1996 and sent them to the respondent. The respondent's solicitors contended that the faxed draft was different from the second draft which was returned to the appellant's solicitors. The trial judge concluded that the faxed draft was different from the second draft as it contained various changes and as all the terms had not been agreed, the faxed draft could not amount to an offer capable of acceptance. The appellant appealed and the Court of Appeal by a majority, upheld the trial judge's decision and dismissed the appeal (see [1998] 2 MLJ 713). The dissenting judge in the Court of Appeal held that the second draft was rejected by the respondent but as the faxed draft was the same as the first draft, the second draft was not an issue any more. Thus, when the appellant's solicitors sent the executed fax draft, there was already a concluded agreement. The appellant appealed. The issue for the court's determination was whether the settlement agreement had been concluded between the parties.

Held, allowing the appeal with costs and affirming the dissenting judgment of the Court of Appeal:

There was a concluded agreement on 9 July 1996 when the appellants executed the copies of the faxed draft settlement agreement as it was essentially the same as the first draft agreement which had been agreed to earlier by both parties. The second draft agreement was no longer

in issue between the parties as it was rejected by the respondent and the appellant reverted to the first draft. Further, in rejecting the faxed draft, the respondent had not disputed the content of the faxed draft but raised other issues (see p 533A–B, E–F, I). A

[Bahasa Malaysia summary B

Perayu dan responden adalah rakan kongsi suatu firma guaman. Oleh kerana terdapat perselisihan antara mereka, mereka membuat keputusan untuk menamatkan perkongsian tersebut dan memulakan rundingan-rundingan untuk menyelesaikan perselisihan-perselisihan melalui suratikatan penyelesaian yang didrafkan oleh Tetuan Kiru & Yong atas arahan responden. Pindaan yang kecil telah dicadangkan kepada draf perjanjian yang pertama dan draf kedua telah dihantar kepada responden, yang telah dilaksanakan oleh perayu. Peguam responden telah menolak draf perjanjian yang kedua di atas alasan bahawa ia mengandungi perubahan yang tidak dipersetujui. Responden juga menyatakan bahawa sebarang perubahan yang dicadangkan oleh perayu patut dirujuk dan dibincangkan dengan En Max Yong dari Tetuan Kiru & Yong. Pada 8 Julai 1996, suatu salinan suratikatan penyelesaian telah difakskan kepada perayu-perayu oleh Tetuan Kiru & Yong ('draf faksimile tersebut'). Perayu-perayu telah melaksanakan draf faksimile tersebut pada 9 Julai 1996 dan menghantarnya kepada responden. Peguam responden menegaskan bahawa draf yang difaksimilekan adalah berbeza daripada draf kedua yang telah dihantar kembali kepada peguam perayu. Hakim perbicaraan menyimpulkan bahawa draf faksimile adalah berbeza daripada draf kedua kerana ia mengandungi pelbagai perubahan dan kerana semua terma-terma belum dipersetujui, draf yang difaksimilekan tidak boleh terjumlah kepada suatu tawaran yang boleh diterima. Perayu telah merayu dan Mahkamah Rayuan dengan majoriti telah mengesahkan keputusan hakim perbicaraan dan menolak rayuan tersebut (lihat [1998] 2 MLJ 713). Hakim telah memberikan keputusan yang berbeza dan memutuskan bahawa draf yang kedua telah ditolak oleh responden tetapi oleh kerana draf yang difaksimilekan adalah sama dengan draf pertama, draf kedua bukan menjadi suatu isu lagi. Oleh itu, apabila peguam perayu menghantar faksimile draf yang telah dilaksanakan, sudah terdapat suatu perjanjian yang telah dipersetujui. Perayu telah merayu. Isu untuk diputuskan mahkamah adalah sama ada perjanjian penyelesaian telah dipersetujui antara pihak-pihak. C D E F G H

Diputuskan, membenarkan rayuan dengan kos-kos dan mengesahkan keputusan menentang penghakiman Mahkamah Rayuan:

Terdapat perjanjian penyelesaian yang dipersetujui pada 9 Julai 1996 apabila perayu-perayu melaksanakan salinan draf perjanjian penyelesaian yang difaksimilekan oleh kerana ia adalah agak sama I

dengan perjanjian draf pertama yang dipersetujui lebih awal oleh kedua-dua pihak. Draf perjanjian yang kedua tidak lagi menjadi isu antara pihak-pihak oleh kerana ia telah ditolak oleh responden dan perayu telah merujuk kepada draf pertama. Selanjutnya, di dalam menolak draf yang difaksimilekan, responden tidak mempertikaikan kandungan draf faksimile tersebut tetapi membangkitkan isu-isu lain (lihat ms 533A–B, E–F, I).]

Notes

For cases on terms in the formation of a contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2204–2205.

Appeal from: Civil Appeal No W–02–322 of 1997 (Court of Appeal, Kuala Lumpur)

Cecil Abraham (*G Rajasingam & Cham Chee Khim* with him) (*Murthi & Partners*) for the appellant.

Joseph Yeo (*Messrs Joseph Yeo*) for the respondent.

Zakaria Yatim FCJ (delivering judgment of the court): This is an appeal against the majority decision of the Court of Appeal (Mokhtar Sidin JCA dissenting) (see [1998] 2 MLJ 713) which confirmed the decision of the learned High Court judge.

The appellant and the respondent were partners of a firm of solicitors. There were differences between the two partners and on 15 October 1996 they dissolved the partnership. After that they entered into negotiations to settle their differences in the form of a written agreement. The only issue before the learned judge was whether an agreement had been concluded between the parties. After considering all the correspondence and other documents before him, the learned judge decided that no agreement had been concluded. The Court of Appeal, by a majority decision, confirmed the decision of the High Court.

In order to determine this appeal, it is necessary to examine the correspondence and the other documents.

On 24 June 1996, the respondent's solicitors, Messrs RR Sethu (Messrs Sethu) wrote to the appellant's solicitors, Messrs Murthi & Partners (Messrs Murthi) informing them that 'as the outstanding dispute is the service of the notice, Max Yong of Messrs Kiru & Yong, the solicitor who drew up the settlement agreement has amended cl 3 of the draft.' Attached to the letter was a copy of the amended cl 3. The letter requested Messrs Murthi to fix the time for the execution of the agreement 'so that this matter can be concluded quickly and the audit of the accounts carried out in the interest of both parties.'

This letter shows that before 24 June 1996 a draft settlement agreement had already been drawn up by Max Yong, a solicitor from Messrs Kiru & Yong on the instruction of the respondent. We shall refer this draft as the first draft.

On 27 June 1996 at 4.30pm, there was a telephone conversation between Messrs Sethu and Messrs Murthi. On the same date Messrs Murthi wrote to Messrs Sethu by a fax transmission referring to the telephone conversation and requesting for a meeting to be arranged between Messrs Murthi and John Fam at Messrs Sethu's office.

It appears that in the telephone conversation referred to in Messrs Murthi's letter, Messrs Murthi had proposed some minor changes to the agreement. This is evident from Messrs Sethu's letter dated on the same day. In that letter Messrs Sethu suggested that the matter of the changes be discussed between Messrs Murthi and Max Yong. Messrs Sethu also suggested that the changes be identified by Messrs Murthi in writing.

On 29 June 1996, Messrs Murthi wrote a letter to Messrs Sethu stating that the appellant had accepted the amended cl 3 of the agreement. Messrs Murthi, however proposed a minor amendment that 'the notice of change of address be also sent by prepaid post.' Enclosed with the letter were 'four sets of the deed of settlement duly executed by the appellant.' These four sets of documents were the second draft.

On 2 July 1996, Messrs Sethu, in response to Messrs Murthi's letter dated 29 June 1996, sent a letter by hand to Messrs Murthi. In that letter Messrs Sethu wrote that the agreement sent by Messrs Murthi which was signed by the appellant contained changes other than as to the notice provision. The letter went on to state that the changes were on cll 7, 8i, 8j and 9. Messrs Sethu said that at the request of their client they had sent a copy of the second draft to Max Yong for his comments. The letter stated:

> We refer to your letter dated 29 June 1996 and copies of the agreement signed by your client. *These are returned herewith because our client had not agreed to the changes*. We had made it clear in our letter that any changes, proposed by your clients ought to be referred to and discussed with Mr Max Yong of Messrs Kiru & Yong first before we deal with them. This had not occurred.
>
> Further, the agreement contains changes other than as to the notice provision. *In particular. what was previously agreed had been changed*: instances are cl 7 (dealing with identity), cl 8i on the exercise of the option by our client of the right to purchase equipment under leasing; cl 8j; cl 9 as to the time and mode of payment of the books. Our client does not want these books; he only agreed to take them as your client did not want them; your client can take the whole lot and pay the value of RM20,000 to our client (subject to the problem on the present state of the bank accounts explained below). At our client's request we have forwarded a copy of your draft (though signed by your client to Mr Max Yong for his comments).
>
> Without any previous notice to our client, and contrary to the basis of the negotiations for the settlement of this matter, your client had written a letter to the firm's bankers in relation to both the office and client's accounts that cheques drawn on either account ought not to be honoured without specific confirmation from your client. The bank has informed our client that all cheques drawn on either account would be dishonoured and that the remark endorsed would be 'Refer to Drawer'. (Emphasis added.)

On 5 July 1997, Messrs Murthi replied that there were no changes to the first draft except the minor amendment on the notice of the change of

address. To justify their statement that there were no changes, Messrs Murthi asked Messrs Sethu to compare the first draft with the second draft.

On 8 July 1996, Messrs Murthi received a faxed copy of the deed of settlement from Max Yong. We shall refer this draft as the faxed copy. On 9 July 1996, Messrs Murthi sent four copies of the faxed draft duly executed by the appellant. Messrs Sethu wrote back on 10 July 1996 to say that the faxed draft was different from the second draft which they returned to Messrs Murthi on 2 July 1996.

The learned judge, in his grounds of judgment concluded that the faxed draft was the draft that had been agreed to by the parties as at 24 June 1996. He then compared the faxed draft with the second draft and concluded that the draft signed by the appellant contained various changes when compared to the faxed draft.

In the Court of Appeal, Mahadev Shankar JCA confirmed that the faxed draft and the second draft were not the same.

Mokhtar Sidin JCA, in his dissenting judgment said that the second draft was rejected by the respondent. In his judgment, his lordship said that 'draft No 3 is the same as draft No 1 without any amendment'. He added that the second draft was not an issue any more. He then concluded ([1998] 2 MLJ 713 at p726A):

> In my view, by 9 July 1996 when the appellant's solicitors sent that signed draft No 3, there was already a concluded agreement.

Mokhtar Sidin JCA arrived at the above conclusion on the basis that the faxed draft was the same as the first draft.

We agree with Mokhtar Sidin JCA that the second draft was no longer an issue between the parties since it was rejected by the respondent. The appellant accordingly reverted to the first draft and signed four copies of the faxed draft.

In our view the first draft had been agreed to by both parties. The respondent was ready to execute the agreement as contained in the first draft. In their letter dated 24 June 1994, Messrs Sethu wrote to Messrs Murthi, 'Kindly fix a date and time for execution preferably at our office as soon as possible ...'.

When Messrs Murthi sent the second draft to Messrs Sethu, the respondent rejected it. Messrs Sethu stated in their letter dated 2 July 1996, that the second draft contained changes. The letter went on to state that 'what was previously agreed had been changed.'

When the faxed draft, which was duly signed by the appellant was received by Messrs Sethu, the latter merely wrote on 10 July 1996:

> These 4 agreements appear to be photostated copies of the agreement faxed to your firm Messrs Kiru & Yong which is different from the other copies which we returned to you with our letter of 2 July 1996.

In that letter the respondent did not dispute the content of the faxed draft. Instead, the respondent raised an issue that the appellant had instructed the bank to stop payment of monies due to clients. The letter said that because of these other issues, the respondent refused to execute the agreement.

In our opinion the faxed draft was the same as the first draft and as stated earlier, this draft had been agreed upon by both parties. This was expressly stated by Messrs Sethu in their letter dated 2 July 1996. Therefore when Messrs Murthi sent four copies of the faxed draft duly signed by the appellant, there was already a concluded agreement.

In their letter dated 10 July 1996, Messrs Sethu wanted an additional indemnity clause to be incorporated into the agreement. This issue could be discussed by the parties separately. In this appeal, this court is only concerned in determining whether a settlement agreement had been concluded between the parties.

For the reasons stated above, we agree with Mokhtar Sidin JCA that as on 9 July 1996, there was already a concluded agreement. We therefore allow the appeal with costs.

Appeal allowed with costs.

Reported by Chin En Tek